

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
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IN THE MATTER OF:
GARRETT GATEWAY PARTNERS, LLC
Applicant

Dean Packard
William Landfair
Steve Mulholland
Michael Lenhart
For the Application

Stephen J. Orens, Esquire
Attorney for the Applicant

Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings

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OZAH Case No. CU 16-11

**OPINION AND ORDER ADMINISTRATIVELY APPROVING A MINOR
AMENDMENT TO CONDITIONAL USE CU 16-11**

I. BACKGROUND

On February 4, 2016, the Applicant, Garrett Gateway Partners, LLC, filed an application seeking approval of a conditional use for a Townhouse Living project consisting of 19 townhouse units, pursuant to Zoning Ordinance §59.3.3.1.D.2.b. The project has been dubbed “Cashell Estates.” The subject site is on a two-acre property in the RE-1 zone, located at 7009 Garrett Road, in Derwood, at the intersection of Garrett Road and Redland Road. It is described as Part of Lot 5, Block B in the Cashell Estates Subdivision and is subject to the 2004 Upper Rock Creek Master Plan. The property is owned by the Applicant and bears Tax Account No. 04-00118126 (Ex. 32).

The proposal is the first to utilize the so-called “Design for Life” conditional use standards adopted by the County Council on April 21, 2015, effective May 11, 2015, in Ordinance No. 18-02 (Zoning Text Amendment No. 15-02). ZTA 15-02 created a new conditional use allowing the establishment of “Design for Life” communities that include features to make access easier for visitors and residents. As noted in the Council’s Opinion accompanying ZTA 15-02, the new conditional use allows an increase in the number of dwelling units per acre over a site’s base zoning, but requires “Level II accommodations,” which include features that allow easy access for the disabled.¹

¹ The Level II Accessibility Standards are referenced in Zoning Ordinance §59.3.3.1.D.2.b.i. as “established by Section 52-106 and detailed in Section 52-107.”

On September 23, 2016, Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report recommending approval of the application, subject to six proposed conditions. Exhibit 49. The Montgomery County Planning Board (Planning Board) met on October 6, 2016, and in a letter dated October 7, 2016, unanimously recommended approval of the application, adopting the conditions recommended by Staff and adding two additional proposed conditions. Exhibit 50. The Planning Board advised in its letter that it had also unanimously approved the Applicant's Preliminary Forest Conservation Plan (PFCP CU2016-11) associated with this conditional use application.

The public hearing proceeded as noticed on October 14, 2016, and the Applicant called four witnesses. There were no community witnesses, and there was no opposition in this case. After the filing of some additional documents, including Technical Staff's supplemental comments, the record closed on November 3, 2016.

On December 2, 2016, the Hearing Examiner approved the conditional use application, subject to 10 conditions, for the reasons set forth at length in his Report and Decision.

On May 23, 2019, the Hearing Examiner granted the request of Garrett Gateway Partners, LLC for an Order extending the implementation period until December 2, 2019, in order to implement plans in the process of being modified by the Planning Department as part of the Preliminary Plan procedures. Exhibit 64. In granting that extension, the Hearing Examiner ordered:

That once it has secured approval by Technical Staff of any proposed plan amendments, the conditional use holder must promptly submit a request to OZAH for a modification of the conditional use to conform to the amended plans, in accordance with Zoning Ordinance §59.7.3.1.K.²

II. The Modification Request

By motion accepted for filing on September 18, 2019 (Exhibit 66),³ counsel for the conditional use holder, Garrett Gateway Partners, LLC, requested that the Hearing Examiner approve a minor amendment of the conditional use by administratively modifying the Conditional Use Plans to comport with plan revisions made as a result of the Planning Board's requirements for approval at the Preliminary Plan of Subdivision Review. According to the Applicant's motion, ". . . the Certified Preliminary Plan approved by M-NCPPC, differs slightly from the approved Conditional Use Plan." Exhibit 66. The Applicant's proposed plans, as revised, are labelled Exhibits 66(a)-66 (h)).

² The Order noted, "If the conditional use holder believes that the proposed plan changes amount to only to a Minor Amendment, it may seek administrative approval from OZAH for a Minor Amendment under Zoning Ordinance §59.7.3.1.K.2. If OZAH determines that the proposed plan changes are significant enough to warrant a Major Amendment, the conditional use holder will be instructed to follow the procedures outlined in Zoning Ordinance §59.7.3.1.K.1." Garrett Gateway Partners, LLC, elected to seek a Minor Amendment.

³ The motion was submitted on September 12, 2019, but the filing fee (10% of the prevailing fee for the Conditional Use, as required by OZAH's Fee Schedule) was not paid until September 18, 2019.

On September 18, 2019, the Hearing Examiner sent the Technical Staff of the Planning Department an email requesting a memorandum for the record confirming whether the changes the Conditional Use Holder submitted are what the Planning Department required, as indicated in the Motion to Amend. The email further requested Technical Staff's opinion as to whether or not the proposed amendments will meet the Zoning Ordinance standard for approval of a Minor Amendment—*i.e.*, whether or not the proposed amendments to the conditional use will “change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.” Zoning Ordinance §59.7.3.1.K.2.a. Exhibit 70.

Technical Staff responded in a letter to the Hearing Examiner on October 8, 2019, confirming that the plan changes noted in the proposed minor amendment are essentially the same as those required by Technical Staff during Preliminary Plan Review, though Staff restated some of the listed changes for clarification. Exhibit 74. In the same letter, Staff stated:

Technical Staff finds that the proposed amendments identified in the Motion meet the standard for approval of a Minor Amendment per Section 7.3.1.K.2.a of the Zoning Ordinance.

More specifically the proposed amendments to the Conditional Use, identified above, will not “change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.”

When considering the underlying Conditional Use, as approved, the modifications requested are minor in nature, will not increase the intensity of the use and will not change the character of the use. Therefore, the proposed amendment will not result in substantial adverse effect on the surrounding neighborhood.

The proposed changes, as clarified by Technical Staff, are as follows (Exhibit 74):

- 1) The right-of-way dedication for Redland Road has been adjusted to reflect the final boundary and plat.
- 2) A one-foot offset has been added to the house on Lot 32 to break the roof line with Lot 31.
- 3) The cross sections on Sheet 2 were modified slightly to meet MCDOT standards.
- 4) A note was added to the plan stating that MCDOT/MDOT shall have the right to close the proposed entrance, without opposition, if the adjoining master planned M-83 roadway is built and the entrance becomes non-compliant.
- 5) Paving and landscaping was added at the alternative entrance off Garrett Road.
- 6) In coordination with WSSC and MCDPS, the alignment of the water, sewer and storm drains were modified to meet code requirements.
- 7) The existing utility pole shown on Lot 14 was relocated to Parcel E, south of Lot 14.
- 8) A sequencing note was added to stipulate that the alternative entrance on the adjoining State of Maryland property must be in an easement agreed to by the State

- prior to issuance of the 10th building permit and must be built prior to issuance of the 17th building permit, unless the M-83 roadway is removed from the master plan.
- 9) The playground equipment was clarified to meet specific vendors capable of providing the required amenities.
 - 10) The onsite and offsite stormwater management facilities we[re] updated to meet County and State standards.
 - 11) The Development Table and Notes were updated to show the correct standards on the cover sheet.
 - 12) The lighting bollards were updated to reflect the vendors specifications.
 - 13) The Mitigation Trees were revised to an acceptable species.
 - 14) The proposed work on the Park Property was updated to standards required by the Parks Department.
 - 15) Additional legend information was added to the plans.

On October 10, 2019, the Applicant confirmed that the list of changes, as clarified by Technical Staff, are the changes to the conditional use sought in the motion to amend (Exhibit 76).

III. The Governing Law

Requests to amend a conditional use are governed by Zoning Ordinance §59.7.3.1.K. Whether an amendment request is characterized as one for a major amendment or for a minor amendment is significant because a *major amendment* application must “*follow[] the same procedures, must meet the same criteria, and must satisfy the same requirements as the original conditional use application . . .*” Zoning Ordinance §59.7.3.1.K.1.b. However, an application for a *minor amendment* need not go through those extensive procedures. Rather, “*. . . it may be approved administratively by the Hearing Examiner.*” Zoning Ordinance §59.7.3.1.K.2.a.

Zoning Ordinance Section 59.7.3.1.K. also defines major and minor amendments:

§59.7.3.1.K.1.a. *A major amendment to a conditional use is one that changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*

§59.7.3.1.K.2.a. *A minor amendment to a conditional use is one that does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*

Whether an application to amend a conditional use is characterized as a major amendment or a minor amendment, the County Council has made it clear that the request to amend a conditional use must be filed with the Hearing Examiner, and not the Board of Appeals.⁴ See Zoning Text Amendment (ZTA) 16-16, (Ord. No. 18-25, eff. 2/27/17), which amended Zoning Ordinance

⁴ The opposite is true with requests to modify special exceptions. They must be filed with the Board of Appeals.

§59.7.3.1.K. to clarify jurisdiction over applications to amend conditional uses and special exceptions. Thus, the Hearing Examiner has the jurisdiction to act on the Applicant's request for a minor amendment of the conditional use in question.

IV. Evaluation and Decision

The evidence before the Hearing Examiner consists of copies of the revised plans; the Applicant's notation that the proposed changes were required by the Petitioner Planning Board at Subdivision; the Applicant's assertion that "the revisions do not change the nature, character, or intensity of the approved Conditional Use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected" (Exhibit 66); and the Technical Staff's Letter of October 8, 2019, confirming that the changes to the plans were required at subdivision and that they "will not 'change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.'" Exhibit 74.

Technical Staff added that "When considering the underlying Conditional Use, as approved, the modifications requested are minor in nature, will not increase the intensity of the use and will not change the character of the use. Therefore, the proposed amendment will not result in substantial adverse effect on the surrounding neighborhood." Exhibit 74.

The definitional distinction between a major and minor amendment is whether the proposal, if granted, would "*change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*" Under the facts of this case, the Hearing Examiner finds that the proposed change would clearly not change the nature or character of the use.

It would still be operating as a Townhouse Living project consisting of 19 townhouse units, pursuant to Zoning Ordinance §59.3.3.1.D.2.b. It would not be expanded in size, and some additional landscaping will be added at the alternative entrance off Garrett Road. The proposed changes appear designed mostly to comply with applicable regulations and standards.

Given the nature of these proposed changes and Technical Staff's evaluation of their likely impacts, one would not reasonably expect substantial adverse effects on the surrounding neighborhood from the proposed amendments. There is also no evidence in the factual record compiled by the Hearing Examiner to demonstrate that the proposed changes would be a significant issue for the neighborhood.

Based on this record, the Hearing Examiner agrees with the Applicant and the Technical Staff that the proposed amendments would not change the nature, character, or intensity of the conditional use. The Hearing Examiner therefore concludes that the proposed modification is properly characterized as a minor amendment – one which will not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use. Thus, the statutory standard for an administrative modification to allow a minor

amendment is satisfied, and it is hereby approved without a public hearing, subject to reconsideration if a request for a hearing is received in accordance with the provisions of this Order.

The Hearing Examiner hastens to add that this ruling does not address whether or not the conditional use holder must obtain any further authorization from any other agency to make the proposed changes. The Hearing Examiner holds only that the terms of the conditional use, as amended by this Order, do not prohibit the plan amendments proposed by the conditional use holder.

The filing of Amended Conditional Use Plans (Exhibit 66(b) – 66 (h)), requires a slight modification to the language of Conditions 7 and 8 of the Conditional Use, which cite to now superseded plans. Those conditions will now read:

7. The common open space area must include a pergola, six raised planted beds, and 3 log benches as shown on the Conditional Use Plans (Exhibits 66(b) – 66 (h)).
8. The amount of parking provided and other conditional use details must be consistent with that described in the Conditional Use Plans (Exhibits 66(b) – 66 (h)).

The added language has been underlined.

ORDER

Based on the foregoing, it is, this 11th day of October, 2019:

ORDERED: That the request for a minor amendment to Conditional Use CU 16-11, allowing changes to the Conditional Use Plans, as depicted in the revised plans (Exhibits 66(b) – 66 (h)), is hereby administratively **APPROVED**, under the terms of the 10 Conditions set forth in Part IV of the Hearing Examiner's Report and Decision of December 2, 2016, as modified herein; and, it is

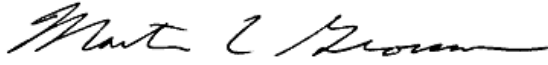
FURTHER ORDERED: That the language of Conditions 7 and 8 of the Conditional Use are hereby modified to read as follows:

7. The common open space area must include a pergola, six raised planted beds, and 3 log benches as shown on the Conditional Use Plans (Exhibits 66(b) – 66 (h)).
8. The amount of parking provided and other conditional use details must be consistent with that described in the Conditional Use Plans (Exhibits 66(b) – 66 (h)).

and, it is **FURTHER ORDERED:** That this amendment and the continued use of the conditional use are subject to all terms and conditions imposed in connection with the initial approval, except as specifically amended by the Hearing Examiner in this Opinion and Order. The Conditional Use holder is directed to comply fully with all applicable county, state and federal regulations; and, it is

FURTHER ORDERED: That pursuant to Section 59.7.3.1.K.2.b. of the Zoning Ordinance, any party may request a public hearing on the Hearing Examiner's action within 15 days after this

decision is issued. The request for public hearing must be in writing, and must specify the reason for the request and the nature of the objection or relief desired. If a request for a hearing is received, the Hearing Examiner must suspend his administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood. If the Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed on the basis of the Hearing Examiner's record to the Board of Appeals.



Martin L. Grossman
Hearing Examiner

NOTICES TO:

Stephen J. Orens Esquire
Peter Ciferri, Esquire
Garrett Gateway Partners, LLC, Applicant
Dean Packard
William Landfair
Steve Mulholland
Michael Lenhart
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Gwen Wright, Director, Planning Department
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Jonathan Casey, Senior Planner, Planning Department
Ehsan Motazed, Department of Permitting Services, Zoning & Site Plan Enforcement
Greg Nichols, Manager, DPS Zoning & Site Plan Enforcement
Barbara Cox, DPS Zoning & Site Plan Enforcement
Michael Coveyou, Acting Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney
Current abutting and confronting property owners
All parties entitled to notice at the time of the original filing:
Abutting and Confronting Property Owners (or a condominium's council of unit owners or renters, if applicable)
Civic, Renters' and Homeowners' Associations within a half mile of the site
Any Municipality within a half mile of the site